09. GENERAL LEGAL PRINCIPLES

Related to the ***Forsyth*** case (**ULP #37-81**), "The Court further held that this was not an occasion to apply the 'capable of repetition, yet evading review' doctrine. The hearing examiner must make specific note that this question is a recurring one and that some clear guidance by the Board and the courts is necessary." **ULP #29-86**.

09.113: Agency – General Principles – Implied Authorization

The Union is a proper party to an unfair labor practice case even before it has been certified as the exclusive representative for a proposed unit. **ULP #15-74**

"In accepting the signature of the President of the local unit on the stipulation in question, the Board of Personnel Appeals relied on a well settled point of law: where a person has been the agent of another in a particular business (in this case collective bargaining) and continues to act within the apparent scope of this former authority, it will be presumed that his authority still continues and his acts will bind hi principal unless the principal makes known that the agent no longer represents him." **DC #4-83**

09.12: Agency – Responsibility of Employer for Acts or Statements of Others

"There was no evidence that [the County's bargaining representative] acted outside the County's negotiating policies." **ULP #31-82**.

09.121: Agency – Responsibility of Employer for Acts or Statements of Others – Supervisory or Managerial Employees

"An anti-union act was committed when Mr. Croff [Ms. Widenhofer's supervisor] presented the tainted evaluation to the Trustees. The Trustees are responsible for this action by Mr. Croff." **ULP #28-76 Montana Supreme Court (1979)**

09.2: Contract

"[T]he individual hiring contract is subsidiary to, and in fact superseded by, the collective bargaining agreement." **ULP #7-80**. See also **ULP #29-80**.

See also **ULP #34-80**.

"It was not just the Federation who was signatory to the contract. For either the Federation or Butte-Silver Bow to do nothing [related to appealing a Court Order ?] negates the contract as it applies to the employees in question and as it applies to the overall integrity of the contract." **ULP #54-89**.

"This case . . . is distinguishable from the Steel Workers trilogy. This case does not involve interpretation. The Defendant only asks for application of the clear unmistakable contract language." **ULP #24-92.**

09.21: Contract – General Principles

"The Montana Supreme Court, in the case of **Massett v. Anaconda Co**…. held that, 'Hence, we see no reason not to apply the same rules of construction in cases involving collective bargaining contracts as we apply in cases dealing with contract law generally'." **DV #8-81 District Court (1982)**

See also **ULP #18-81**.

09.231: Contract – Construction of Contract – Written Terms

"'[C]ontract language cannot be considered ambiguous merely because the parties disagree over the meaning of a phrase, but rather must be judged by whether it is so clear on the issue in question that the intentions of the parties can be determined using no other guide than the contract itself – whether a single, obvious, and reasonable meaning appears from a reading of the language in the context of the rest of the contract.' (Hill and Sinicropi, Evidence in Arbitration, page 53)." **ULP #18-81**

09.25: Contract – Breach of Contract

See also **#5-80**.

09.3: General Legal Principles – Evidence [See also 32.57, 35.49, 47.13, 71.211, 71.517, and 81.48.]

"[T]he Hearing Officer should have included evidence of events occurring prior to Carlson's merit increase." **ULP #10-80 Montana Supreme Court (1982)**

09.31: Evidence – Applicability of Rules of Evidence

"[F]inding of fact can only be based on matters within the four corners of the record, including testimony of witness, exhibits, matters officially noticed, jurisdictional papers, etc." **US #10C-74**

"Keeping in mind that formal hearings before this Board are administrative and statutory or common law rules of evidence are not enforced. I welcome nearly any testimony or evidence that may indicate the perimeter of the existing bargaining unit." **DC #2-81**

"Section **39-31-406 MCA** states that the Board of Personnel Appeals is not bound by the rules of evidence prevailing in the courts. Rule **24.26.201 ARM**

states that the Board of Personnel Appeals adopts the model rules proposed by the Attorney General. The Attorney General's Model Rule 13, **1.3.217 ARM**, states that in all contested cases discovery shall be available to the parties in accordance with rule 26, 28 through 37 of the Montana Rules of Civil Procedure. Therefore, a conclusion that the Board of Personnel Appeals is governed by Rule 32(a) of the Montana Rules of Civil Procedure is in order." **ULP #9-83**

09.32: Evidence – Burden of Proof [See also 09.33, 71.211, and 71.517.]

"It is elementary in cases such as this that the Complainant has the burden of proof, that is the burden of producing evidence of a particular fact in issue and the burden of persuading the hearing examiner that the alleged fact is true. Finding of fact can only be based on matters within the four corners of the record…." **UD #10C-74**

"Once it has been proven that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." **ULP #16-78**

"AFSCME must carry the burden of proving that the criteria set out in Hollywood Ceramics, under the circumstances, lead to the conclusion that the election among the Montana State Prison employees does not likely represent true employee choice." **DC #17-79**

"The National Labor Relations Board in Wright Line… reformulated the allocation of the burden of proof in such cases [of disciplining an employee based upon the employee's union activity]…. The first test is the requirement that the complainant make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the first test is satisfied, the burden will shift to the employee in the second test to demonstrate that the same action would have taken place even in the absence of the protected conduct." **ULP #15-83**

See also **ULPs #11-79 and #38-81**.

"Both the United States Supreme Court and the Montana Supreme Court have determined that if the charging party has shown substantial evidence that an employee was illegally discharged for protected activity, the burden is on management to show, by a preponderance of the evidence that the reason for discharge was not related to protected activity. ***NLRB v. Transportation Management Corporation, supra, Board of Trustees v. State of Montana, supra.***" **ULP #1-87**.

09.33: Evidence – Weight and Sufficiency [See also 9.32, 71.211, and 71.517.]

"The hearing examiner cannot assume that mere allegations are fact even though he may have more than a healthy suspicion that the allegations are probably true." **UD #10C-74**

"The Complainant's case must be established by a preponderance of the evidence before an unfair labor practice may be found. Section **39-31-406, MCA**." **ULP #28-76 Montana Supreme Court (1979)**

"Substantial evidence has been defined by [the Montana Supreme] Court as such as will convince reasonable men and on which such may not reasonable differ as to whether it establishes the plaintiff's case, and if all reasonable men must conclude that evidence does not establish such case, then it is not substantial evidence. The evidence may be inherently weak and still be deemed "substantial," and one witness may be sufficient to establish the preponderance of a case.' [**Olson vs. West Fork Properties, Inc., Mont., 554 p.2d 821 (1976)] ULP #20-78**

"New facts introduced in the briefs that have not been subject to or have not had an opportunity to be subject to cross examination will not be given weight….." **ULP #20-78**

See also **ULP #11-79**.

"While all parties expend significant portions of their briefs arguing on the sufficiency of the evidence, we cannot consider any of these arguments in the absence of a transcript of the testimony at the original hearing" (where there was live testimony by actual witnesses). **ULP #38-80 Montana Supreme Court (1986).**

"There is substantial evidence that Mike Mahan's participation in the drafting of the list of complaints was a motivating factor in the decision to terminate him. There is substantial evidence that Mike Mahan's concerted, and therefore protected, activity was a motivating factor in Larry Williams' decision to discharge Mike Mahan." **ULP #1-87**.

"Pursuant to **Section** 39-31-406 MCA the Complainants' case must be established by a preponderance of the evidence before an unfair labor practice may be found. ***Board of Trustees vs. State of Montana*, 103 LRRM 3090, 604 P.2d 770 (1979)**; see also ***Indiana Metal Products vs. NLRB*, 31 LRRM 2490, 202 F.2d 613, CA 7 (1953),** and ***NLRB vs. Kaiser Aluminum and Chemical Corporation*, 34 LRRM 2412, 217 F.2d 366, CA 9 (1954)**." **ULP #14-87.** See also **ULPs #19-86, #17-87, #24-87, #34-87, #12-88, #19-88, #27-88, #4-89, #14-89, #62-89, and #64-89**.

Section 39-31-406(5) MCA requires that, if, upon the preponderance of the evidence taken, the Board is not of the opinion that the person named in the complaint has engaged in or is engaging in the unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the compla int." **ULP #14-87**. See also **ULPs #32-86, #17-87, #24-87, #19-88, and #27-88.**

"Jury instructions number 21.0 of the *Montana Jury Instruction Guide* states: 'By preponderance of the evidence is meant such evidence as, when weighted with that opposed to it, has more convincing force from which it results that the great probability of truth lies there in. This means that if no evidence were given on either side of an issue your finding would have to be against the party asserting that issue. In the event the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it.'" **ULP#27-88**. See also **ULP #14-89.**

"No reliable, probative, or substantial evidence or argument submitted in this matter shows that it was an unfair labor practice for the defendant to file grievances." **ULP #32-86**.

"I find no probative evidence which indicates the college retaliated against either Mr. Talley or Mr. Waltmire for their union activity." **ULP #67-89**

09.36: Evidence – Witnesses

"Under the Montana Rules of Civil Procedure the use of depositions is carefully prescribed in **Rule 32(a).** They may be used to impeach the testimony of the deponent… They may be used if the person deposed was "at the time of taking the deposition" one of a specified list of agents of a party …. Finally the deposition may be used if the witness is dead, more than 100 miles from the place of hearing, or unable to testify because of age, illness, infirmity or imprisonment…. There is absolutely no excuse for admission of an unsigned deposition from a person easily available for testimony'." **ULP #9-83**

09.362: Evidence – Witnesses – Credibility

"'A resolution of the … issues calls for an objective determination of the veracity of the two witnesses whose testimony is highly conflicting on the crucial questions… I am… compelled to consider the relationship of the parties, one to the other, the readily responsive, nonselective, nonexaggerating, consistent and straightforward manner in which they testified, the reasonableness of efforts made by each to bring essential witnesses and appropriate documentary evidence relates to the logical consistency of all of the evidence of record and

the sequence of events as they transpired.' [**F.S. Willey Co., Inc. and William, 224, NLRB No. 151 (1976)**, p.11]" **ULP #18-82**

If the testimony conflicts, the hearing examiner "must make a determination of credibility. . . . [and] weigh the testimony not just in the light of the demeanor of the witnesses but test it against its inherent probability or improbability, consistency or inconsistency and whether or not it was uncontradicted or contradicted." **ULP #19-85.**

"The hearing examiner is stuck with the difficult task of determining the facts in the face of conflicting testimony.... The sequence of events invites suspicion.... The complainant submitted no bargaining notes.... It seems very unlikely that the bargaining teams avoided bargaining table conversation about the seven (7) period day in view of the extensive discussion elsewhere and the Polson Education Association's proposal to define the workday.... The demeanor of the witnesses and the circumstances surrounding the events leading to this complaint lend credibility to the defendant's contention: the complainant's bargaining team was fully apprised of the intent behind the School District's seven and three-quarter (7.75) hour teacher workday proposal; namely the intent to implement the seven (7) period day." **ULP #27-88**.

09.374: Evidence – Special Kinds of Evidence – Circumstantial

"Counsel for both parties agree that the decision in this matter may be based on circumstantial evidence and they both cite **Exchange State Bank of Glendive v. Occident Elevator Co**…. as authority for that principle and for the standard by which the quantum of evidence should be measured…. The Court in Exchange held: 'The solution of any issue in a civil case may rest entirely on circumstantial evidence…. All that is required is that the evidence shall produce moral certainty in an unprejudiced mind…. In other words, when it furnishes support for the Plaintiff's theory of the case, and thus tends to exclude any other theory, it is sufficient to sustain a verdict or decision'." **ULP #6-84**

09.379: Evidence — Special Kinds of Evidence — Records

"[T]he paper trail is the only evidence as to what the status of holidays was at the time the first collective bargaining agreement was reached. Based on that paper trail, the most telling documents are the time cards and the letter from the non-certified staff requesting reinstatement of holidays and referencing section **75-7406 RCM**, the codified statute relied upon the Board in its defense." **ULP #31-89**.

09.391: Evidence – Admissibility – Parol

See **Butte Teacher's Union v. Butte School District (1982).**

09.411: Res Judicata – Prior Decisions – Board

See **ULPs #13-76, #5-80, #7-80, #34-80, #39-80,** and **#22-81** and **UDs #6-79, #5-80,** and **#14-80**.

See **ULPs #29-84, #6-86, #10-86, #19-86, #20-86, #29-86, #14-87, #17-87, #24-87, #34-87, #12-88, #19-88, #27-88, #32-88, #4-89, #7-89, #12-89, #14-89, #54-89, #62-89, #64-89, #67-89, #13-90, and #7-91; UDs #4-85, #6- 88, #12-88, #5-89, #7-89, #16-89, and #23-90; UCs #2-87, #2-88, #9-88, #6-89, #4-90, and #3-91; and DC #16-89.**

09.412: Res Judicata – Prior Decisions – Court

The Board of Personnel Appeals specifically rejected "the use of public sector cases as precedent in this case" because Montana's Public Employees Collective Bargaining Act "is modeled almost identically after the federal Act, the Labor-Management Relations Act…. For this reason and other cogent reasons, the Montana Supreme Court, when called upon to interpret… **39-31-101** through **39-31-409, MCA**, has consistently turned to National Labor Relations Board (NLRB) precedent for guidance…. [T]he public sector collective bargaining acts of other states are not always similar to Montana's Act…. [T]he use of another state's precedent in one case becomes precedent in itself to continue using that other state's precedent for other labor matters…. There…[also] is the problem of which state do we follow…. It is thus seen that the states themselves are at odds over the issue before us in this case." **ULP #37-81**

See also **ULPs #13-76, #20-78, #11-79, #7-80, #19-80, #34-80, #39-80, #16-81,** and **#38-81** and **ULP #28-76 Montana District Court (1978)** and **Supreme Court (1979)**

See **ULPs #29-84, #10-86, #19-86, #29-86, #7-89, #12-89, #13-89, #14-89, #20-89, #54-89, #64-89, #67-89, and #24-92; UDs #4-85, #15-87, #7-89 and #23-90; UCs #2-87, #2-88, #9-88, #6-89, #4-90, and #3-91; and ULP #17-87 District Court (1989).**

09.413: Res Judicata – Prior Decisions – Other Tribunals

"We held in **State Department of Highways v. Public Employees Craft Council (1974), 165 Mont. 349, 539 P.2d 785**, and in **Local 2390 of American Federation, Etc., v. City of Billings (1976), 171 Mont. 20, 555 P2d 507, 93 LRRM 2753**, that it is appropriate for the Board of Personnel Appeals to consider NLRB precedents in interpreting and administering the Public Employees Collective Bargaining Act." **ULP #20-78 Montana Supreme Court (1979)**

"[T]he Labor Management Relations Act represents broad national trends in labor relations law, not the result of political decision making in one state which might have no bearing on Montana's Act…. This Board believes that the wording of Montana's Act reflects a legislative intent to follow those broad national trends….[T]he members of the Board of Personnel Appeals believe that the National Labor Relations Board and the federal courts reviewing the National Labor Relations Board constitute a better area of law to draw precedent from because of the federal sector's (a) greater experience (since 1936); (b) greater number of cases (the LMRA is national of course); and (c) greater consistency, to the extent possible with the continuing development of labor law, as in all areas of law." **ULP #37-81**

The Montana Supreme Court looks to the construction federal courts have placed on the National Labor Relations Act to aid it in interpreting the Collective Bargaining for Public Employees Act. **Small v. McRae (1982)**

"Federal court decisions that affirm National Labor Relations Board rulings do so because the rulings are based on substantial evidence and are in accord with the N.L.R.B.'s statutory mandate. Should the N.L.R.B. determine at some future time that, in view of changing factual conditions, a new ruling should be implemented, that policy will be measured on judicial review by the same or similar principles of substantial evidence and statutory compliance that were employed in previous judicial decisions, not by whether the new ruling is in accord with the previous court decisions…. We will adhere to the same principles when evaluating appeals of future Board decisions." **ULP #3-79 Montana Supreme Court (1984)**

See also **UDs #21-77 and #6-79; ULPs #20-78, #2-79, #3-79, #11-79, #5-80, #7-80, #19-80, #34-80, #39-80, #16-81, #30-81,** and **#29-84; and ULP #24-77 Montana Supreme Court (1981)** and **District Court (1985), ULP #3-79 Montana Supreme Court (1982), Department of Highways v. Public Employees Craft Council (1974)** and **Ford v. University of Montana (1979).**

See **ULPs #29-84, #6-86, #19-86, #29-86, #14-87, #17-87, #24-87, #34-87, #12-88, #19-88, #27-88, #4-89, #7-89, #14-89, #20-89, #62-89, #64-89, #10-90, #13-90, #1-91, #7-91, #8-92, and #24-92; UDs #4-85, #15-87, #5-89, #7-89, #16-89, #23-90, and #24-90; UCs #5-85, #6-85, #2-87, #2-88, #9-88, #12-88, #3-89, #6-89, #4-90, and #3-91; and DCs #19-85 and #16-89**.

09.43: Res Judicata – Application

See **ULPs #20-78** and **#11-79.**

09.6: Waiver [See also 21.9, 32.18, 35.14, and 72.590]

09.61: Waiver — Form

"A party may contractually waive its right to bargain about a particular mandatory subject. ***Ador Corp*, 150 NLRB 1658, 58 LRRM 1380 (1965)**; ***Druwhit Metal Products Co*., 153 NLRB 346, 59 LRRM 1359 (1965)**. Where such an assertion of waiver has been made, the test applied has been whether the waiver is in 'clear and unmistakable' language. ***Norris Industries*, 231 NLRB 50, 96 LRRM 1078 (1977)**; **Memoranda of NLRB General Counsel, *Reynolds Electrical and Engineering Company*, Case No. 31-CA-16234 (May, 1987), 125 LRRM 1368, 1371**." **ULP #12-89**.

"In collective bargaining, a union may waive a bargaining right that is protected by the National Labor Relations Act." **ULP #9-83**

09.613: Waiver – Form – Implied

"[W]aivers of rights may not be inferred, they must be clearly and unequivocally expressed. Here, there is far more confusion than certainty….There was no meeting of minds, no clear agreement, no intention or conscious waiver of rights. Thus I conclude that even if the Montana Public Employees Association could have waived the statutory and regulatory requirements for new unit certification, it did not." **DC #22-77 District Court (1978)**

See also **ULP #31-82, Reiter v. Yellowstone County (1981),** and **Welsh v. Great Falls (1984).**

09.62: Waiver – Waiver of Board Procedures

"A law established for a public reason cannot be contravened by a private agreement (Section 49-105)…. I hold, then, that the procedural requirements of Section **59-1606**, and ARM Section **24.26.501** through **24.26.516** and **24.26.530** through **24.26.534** insofar as they may be legally propounded pursuant to the statute, cannot be waived either by counsel or by the Board of Personnel Appeals or its agents, and that they could not be effectively waived or diminished in any way in this case." **DC #22-77 District Court (1978)**

"Because the court in Local 743 … states public interest prevents the waiver of unfair labor practice charges and because the court in Neiss …states law established for a public reason cannot be compromised, I cannot see why the Board of Personnel Appeals should not adopt the teachings of the court in Local 743 … when addressing a written unfair labor practice waiver …. Then, it should follow that if the Board of Personnel Appeals applies the above standard to a written waiver, the Board of Personnel Appeals should have a standard that a waiver by inaction is also useless." **ULP #31-82**

The president of a Montana Education Association local has the authority of waive strict compliance with certain filing and posting procedural rules in order

to expedite an election of exclusive representation of the same local. The authority to waive strict compliance with those rules does not necessarily have to come from the exact same person who had previously filed a formal document in the proceeding. **DC #4-83**

09.64: Waiver – Right to Bargain, Waiver by Contract [See also 21.9, 72.590, and 73.478.]

"[I]t is elementary that a law established for a public reason cannot be compromised by private agreement…' [**State of Montana ex rel,. Neiss v. District Court of the Thirteenth Judicial District, 511 P.2d 979, 1973]" ULP #31-82**

"The National Labor Relations Board cases teach that any waiver of the statutory right to bargain over a mandatory subject of bargaining must be in 'clear and unmistakable language.' … [T]he National Labor Relations Board has been reluctant to infer a waiver." **ULP #9-83**

09.642: Waiver — Right to Bargain, Waiver by Contract — Unilateral Changes during Contract Term

"Article 23 of the Collective Bargaining Agreement consists of a waiver of bargaining rights. It is a waiver of the type commonly referred to as a 'zipper clause.' The waiver contains language by which the parties clearly and unambiguously waive their rights to bargain over anything, including compulsory bargaining subjects such as layoffs, hours of work and work schedules." **ULP #17-87**.

09.651: Waiver – Right to Bargain, Waiver by Conduct – Failure to Request Bargaining

See **Butte Teacher's Union v. Butte School District (1982).**

"Inasmuch as the Complainant failed to move the grievance on to the next step, the Defendant has not refused to process a grievance." **ULP #19-88**.

09.7: *Estoppel* [See also 71.516.]

"Collateral estoppel bars the relitigation of an issue where the issue is identical to an issue previously decided, a final judgment as to the issue has been rendered, and the party against whom the claim is advanced remains the same or is a privy of the earlier party. . . . Mr. Klundt is precluded from raising this issue." **ULP #38-80 Montana Supreme Court (1986).**

"The Supreme Court in *Forsyth v. Board*...did not address the heart of the *Forsyth* case which was whether failure to implement negotiated steps

constituted an unfair labor practice. The Supreme Court ruled that because retroactive benefits were paid *Forsyth* was moot." **ULP #29-86**.

"Conditions as they existed at the time of the hearing do not warrant any affirmative action to effectuate the policies of the Montana Collective Bargaining for Public Employees Act, **Section** 39-31-101 et seq., MCA." **ULP #24-87**.

"The charges as filed by the Association are moot and further litigation of resolved matters is contrary to public policy and the intent of the Collective Bargaining Act for Public Employees." **ULP #32-88.**

"It was an Unfair Labor Practice for the defendants to seek to discipline the complainants with a fine for supporting the decertification effort. However, that matter was rendered moot when the American Federation of State, County and Municipal Employees internal procedures denied the defendants' request for a fine." **ULPs #62-89** and **#64-89**.

09.71: Estoppel – Elements of Estoppel

See **Reiter v. Yellowstone County (1981).**

***09.73: Estoppel — Estoppel* of Board**

"The fact that no appeal was taken of the District Court Order is not sufficient to act as a bar to the [unfair labor practice] charge filed by the Federation." **ULP #54-89**.